Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Amendment of the Commission's Rules	)	
Governing Modification of FM and AM	)	MB Docket No. _____
Authorizations	)	RM - 10960
	)	

To: Office of the Secretary

COMMENTS

CUMULUS LICENSING LLC
MARATHON MEDIA GROUP, LLC
3 POINT MEDIA, LLC
DESERT SKY MEDIA, LLC
MILLCREEK BROADCASTING, LLC
APEX BROADCASTING, INC.
GREAT SOUTH RFDC, LLC
HUNT BROADCASTING, INC.
ALEXANDER BROADCASTING CO., INC.

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May 24, 2004

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SUMMARY

In the instant Comments, a number of FM licenses who avail themselves of the Commission's rule making procedures support the effort of First Broadcasting Investment Partners, LLC to streamline the Commission's procedures governing FM rule makings and applications. The purpose of these Comments is to encourage the Commission to make the processing of FM rule makings and applications more efficient under Section 307(b) of the Communications Act. The Parties realize that the Commission is understaffed and there is no real hope of increased funding in the near future. Therefore, the Parties believe that it is time for the Commission to perform a comprehensive review of the FM rule making and application procedures to determine what procedural and substantive initiatives could conserve resources and permit the introduction of new and improved service. To that end, the Parties submit comments on the following in support of First Broadcasting's Petition for Rule Making:

- The Commission should permit an FM station to change community of license through a minor modification application;
- The Commission should permit an FM licensee to surrender its license, as AM licensees are so permitted, and delete the corresponding allotment; and
- The Commission should streamline the process for downgrading a Class C station to Class C0 status.

Additionally, the Parties propose the following changes to the Commission's rules and policies that are also designed to more efficiently carry out the mandate of Section 307(b) of the Communications Act:

- Payment of the rule making filing fee when the petition or counterproposal is filed rather than when granted;
- Permit applicants to propose changes in vacant allotment reference points;
- Permit the use of alternative contour prediction methods at the allocation stage for city grade coverage; and
- Make the allocations workload available to the public.

The adoption of these rule and policy changes is in the public interest because the Commission will be able to utilize its limited resources more efficiently, which will result in the expeditious delivery of better radio service to the public and more efficient use of the spectrum.

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COMMENTS

3 Point Media, LLC, Alexander Broadcasting Company, Inc., Apex Broadcasting, Inc., Cumulus Licensing LLC, Desert Sky Media, LLC, Great South RFDC, LLC, Hunt Broadcasting, Inc., Marathon Media Group, LLC, and Millcreek Broadcasting, LLC (collectively, the "Parties") by their counsel, hereby submit their Comments in the above captioned proceeding. *See Public Notice*, Report No. 2657, (released April 22, 2004). Each of these Parties have been active in the filing of FM rule making petitions and applications and desire to suggest and support proposals which have the purpose of reducing the processing time and resources needed to provide the service. The Parties support a number of the proposals, discussed in more detail below, raised by First Broadcasting Investment Partners, LLC ("First Broadcasting") in its Petition for Rule Making filed on March 5, 2004 (the "First Broadcasting Petition"). Additionally, in these Comments, the Parties propose additional changes to the Commission's rules and policies that are designed to more efficiently carry out the mandate of Section 307(b) of the Communications Act. In support hereof, the Parties state the following:

I. INTRODUCTION.

1. The number of FM rule making proposals submitted to the FCC has continued to expand despite the expectation that as the spectrum becomes more crowded there would be fewer proposals that are technically possible. The demand for radio station ownership has not diminished, and every station owner looks for ways to improve its facility. Moreover, with every station move there is spectrum space opened for another move. Thus, the FCC should not expect the number of filings to diminish. Instead the FCC should be considering ways to handle the number of petitions that are filed in a more timely fashion. Due to budget constraints and other priorities, it is clear to the broadcast community and the Parties to these Comments that the FCC is unable to devote more resources to deal with the FM workload. Therefore the solution should be to consider ways to streamline the process.

2. The Parties do not need to demonstrate that the processing time to dispose of FM rule making petitions is in great need of repair, because the chronic delays in processing time are well-known to the Commission. However, a recent rule making decision (MM Docket No. 99-240) issued just last week is worth mentioning. The petition of Susquehanna Radio Corporation to change its community of license from Albemarle, NC to Indian Trail, NC was filed on Nov. 9, 1998. Only one station was involved and only two objections were filed. Yet the ***Report and Order*** was not issued until July 13, 2001 (two and one-half years later). When one party filed an Application for Review, the Commission decision took another three years, for a total of 5½ years before the Commission. There was nothing extraordinary or complex about this case. In fact, the record in the case is relatively small compared to other cases. While the Parties recognize that some cases like this may "slip through the cracks," unfortunately there are far too many slippages.

3. The average processing time for a petition to amend the FM Table of Allotments once was less than one year. But it is the rare case that now is processed in that time frame. The average case now takes 2 to 3 years. This raises the question of whether the Commission's processes are adequate to serve its goals. The FCC's mandate from Congress, set forth in Section 307(b) of the Communications Act of 1934, as amended, is to "make such distribution of …frequencies,…among the several States and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same." It is the position of the Parties that the FCC is not currently acting, and has not for some time acted, in an *efficient* manner. The proposals offered below are intended to assist the FCC in creating a more efficient process of delivering the FM service to the country.

II. COMMENTS IN SUPPORT OF THE FIRST BROADCASTING PETITION.

A. The Commission Should Permit an FM Station to Change Community of License Through a Minor Modification Application.

4. In its Petition, First Broadcasting proposes to permit FM stations to change their community of license by minor modification application rather than by rule making.[1] Section 73.202(b) of the Commission's Rules lists FM channel allotments by community and state. Currently, any licensee of an FM station desiring to change its community of license must file a petition for rule making to amend the FM Table of Allotments. An AM licensee may change its community of license by application, but these applications are classified as major modifications and can only be filed in a designated filing window.[2] Whether called major or minor, the showing that is needed to justify the change in community of license under Section 307(b) can be submitted in an exhibit to the application.

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1 *See* First Broadcasting Petition at p. 8.

2 *See* 47 C.F.R. § 73.3771(a).

5. The majority of FM allotment petitions that are filed propose a change to one or more communities of license. If these changes could be accomplished by application, perhaps 50% of the backlog of the allocations staff could be eliminated. Currently up to 4 stations can file contingent applications under Section 73.3517(e) of the Commission's Rules. Thus, where more than 4 stations are involved or vacant channels are involved it will still be necessary to file a rule making petition. However, proposals of this complexity are rare. Permitting the vast majority of simpler proposals to be filed as applications would greatly benefit the Commission and the public by (i) reducing the amount of agency staffing and processing time required to handle routine changes in community of license; (ii) reducing the backlog in rule making processing; and (iii) speeding the introduction of improved service to the public.

6. The Commission already permits certain amendments to the FM Table of Allotments to be accomplished by application. Under the "one-step" procedures, an FM licensee may apply for an adjacent channel or a change in class as long as the change is mutually exclusive with the existing facilities.[3] When such an application is granted, the rule changes take effect upon publication in the Federal Register.[4] Such a procedure complies with the Commission's obligations under the Administrative Procedure Act to provide notice to the public and an opportunity to comment.[5]

7. Although the Commission has previously considered and rejected similar proposals to permit a change in community of license by application, changed circumstances dictate that the Commission revisit the issue. In adopting the one-step rule, the Commission

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[3] *See Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application*, 8 FCC Rcd 4735 (1993) ("*FM Channel*").

[4] *Id*. at 4737 n.18.

[5] *See 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, 15 FCC Rcd 21649 at n. 54 (2000) (amendments treated as minor and non-controversial) ("*1998 Biennial Review*").

declined to bring changes in community of license within the scope of that rule.[6] The Commission noted a potential conflict with the rule against contingent applications then in effect, but left the door open to reconsideration when more experience had been gained with the one-step process.[7] In the nearly a decade that has passed, both of those circumstances have changed, making reconsideration appropriate. Since 1993, of course, the contingent application rule has been modified to allow up to four contingent applications to be processed together,[8] and the one-step rule has proved to be a more efficient and expedient process. Accordingly, there are ample grounds for the Commission to reconsider its earlier determination with respect to changes in community of license.[9] In addition, during the AM filing window which closed on February 1, 2000, the Commission entertained many change in community of license applications which contained Section 307(b) showings and the comparative analysis was made under the Commission's existing policies and precedent without formal rule making procedures.

8. While some proposals to change community of license can have an extensive preclusive impact, upgrade proposals processed under the one-step rules often have as much or even more preclusive impact than community of license changes. If preclusion is a concern the FCC may take a more limited step by restricting the change in community of license to only those moves where at least a 60 dBu contour (rather than a 70 dBu contour) continues to be placed over the former community of license. The Parties recommend that the Commission invite comments on such a proposal to determine how beneficial such a limitation would be.

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6 *FM Channel* 18 FCC Rcd at 4740.

7 *Id*.

8 *See Technical Streamlining First Report and Order,* 14 FCC Rcd 5272 (1999).

9 In 1999, the Commission declined to permit AM and FM noncommercial licensees to change community of license by minor change. *Technical Streamlining First Report and Order*, 14 FCC Rcd at 5272. The Commission was concerned that Section 307(b) concerns would not be sufficiently protected under such a rule. However, experience with the one-step upgrade and contingent application process has demonstrated that Section 307(b) considerations can be evaluated in an application context.

9. The Commission will be able to make the public interest determination under Section 307(b) pursuant to existing rules and policies by requesting an exhibit which discusses the various policy requirements as is currently required in a petition for rule making. Such analysis can be made in connection with the processing of an application just as is currently performed in the rule making context. Under existing Commission rules, comments can be filed on an informal basis at any time prior to action on the application but in no event less than 30 days after public notice, except in the most extraordinary circumstances. The 307(b) analysis has been successfully performed in the AM service during the last two window filings for major changes. The only difference for AM and non-commercial educational (NCE) FM stations filing these requests as minor modifications would be to eliminate the opportunity for conflicting applications. But certainly the AM band and to a lesser extent the NCE band is mature and the opportunity for filing for new communities of license has been available in varying degrees during the last 40 years.

10. By permitting this change to the Commission's procedures in processing change in community of license requests, the agency could focus its limited resources on the more complicated proposals (over four contingent changes) and petitions for new allotments which when filing fees are imposed (see discussion in Section III.A) would reduce the workload of the Commission's staff substantially.

B. The Commission Should Permit an FM Licensee to Surrender its License, as AM Licenses are so Permitted, and Delete the Corresponding Allotment.

11. In its Petition, First Broadcasting proposed procedures to simplify the removal of vacant allotments from the FM table of allotments.[10] The Parties support this proposal and

[10] *See* First Broadcasting Petition at p. 19.

would encourage the Commission to expand the scope of this proposal to also permit an FM licensee to surrender its license, as AM licenses are so permitted.

12. Currently, AM stations may voluntarily relinquish their authorization, allow a license to expire or suffer a revocation of license, and the frequency of the former station will no longer remain in the Commission's databases requiring protection by other facilities. Such a relinquishment may be the result of an interference reduction arrangement, or an AM station licensee may determine that the economic prospects for continuing to serve its community of license and service area are poor. When an AM station surrenders its license or the license is expired or revoked, spectrum is left open which, provided that current technical rules are satisfied, may be applied for by existing stations or by new applicants. In many cases, this open AM spectrum is put to a more productive use, either at a community that can better support the broadcast service, or through the expansion of an existing service to better serve its community and surrounding area. The Commission does not perform a Section 307(b) analysis when accepting the voluntary relinquishment of, or when expiring or revoking, an AM station license. Rather, the turning in of the AM authorization is a simple and efficient procedure involving little of the Commission's resources.

13. For the FM band, however, when an existing license or construction permit is turned in, expires due to operation of law or due to a lack of construction within the required time period, or is revoked, the underlying allotment remains. This is neither good public policy nor an efficient use of Commission resources. Many years ago the Commission determined to do away with the economic showing it has previously required for the addition of FM channels to the FM Table of Allotments. In doing so, the Commission announced that it would not pre-judge whether a certain community or certain area could successfully support an FM broadcast

station. Rather, that determination was to be left up to the "marketplace" and the requested allotment would be made irrespective of the economic sense such an allotment might make in the overall scheme of the FM table of allotments and the operation of radio broadcast stations.

14. Today, there are thousands of FM allotments, and many communities of just several hundred people have FM allotments. Some of these allotments are for marginal facilities that will never be successful either economically or in service to their communities. Some of these marginal FM stations operate with less than minimum operating schedules, sporadically, or not at all due to the inability of the market to financially support a station. Other FM facilities, while perhaps more economically successful, are allotted in such a way that in a marketplace analysis, the allotment would make far better sense if allotted elsewhere, or a deletion would enable other stations whose markets have grown or expanded in new directions to increase service to the public. In addition, as a technical matter, there are many opportunities for FM interference reduction (i.e. short spacing elimination) or facility improvement if a short spaced station could be eliminated through the deletion of certain allotments.

15. Therefore, if an FM station is removed from the air, either voluntarily by the licensee or permittee, or by Commission action or law, and the license is surrendered, it expires, or it is revoked, the underlying FM allotment should simultaneously be deleted from the FM Table of Allotments on the surrender date, expiration date or revocation date. The available spacing area resulting from the deleted allotment would then be available to the public under existing allotment and application procedures for either a new allotment at perhaps a more deserving community, or for expanded service from existing stations.

16. The underlying rationale for an automatic deletion of the allotment upon surrender or expiration is sound. In addition to the Section 307(b) showing required for a new

allotment in the first instance, an intention to apply for, build and operate a station must be shown by an interested party in order for an allotment to be made. By definition, if an FM station license is later surrendered or expires, the stated intention or ability to operate by an interested party has failed. The basis upon which the allotment was made in the first instance, no matter how distant in the past, is no longer present. Under these circumstances, the deletion of an FM allotment from the FM Table of Allotments upon the cancellation, expiration or in rare cases, revocation, of an FM license or permit should be simultaneous with such cancellation, expiration or revocation. By eliminating the underlying allotment, the Commission could avoid additional rule making proceedings proposing to delete, downgrade or substitute the vacant channel for the benefit of another precluded use.

C. The Commission Should Streamline the Process for Downgrading a Class C Station to Class CO Status.

17. In its Petition, First Broadcasting proposed modifying the current Commission procedures for downgrading a Class C station to Class C0 status in order to ensure that the original objectives behind the adoption of the Class C to Class C0 downgrade procedures are fully realized.[11] The Parties support the overall premise of this proposal, but hereby submit their own proposal to modify the current Commission procedures for downgrading a Class C station to Class C0 status.

18. The process to convert an underutilized Class C license to Class C0 currently involves the issuance of an Order to Show Cause to the Class C licensee with a 30 day period for response and thereafter a 180 day period to file the application.[12] In the great majority of cases, this process has resulted in substantial delays at several stages. The first stage (issuance of the

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[11] *See* First Broadcasting Petition at p. 30.

[12] *1998 Biennial Review*, 15 FCC Rcd at 21649, *supra*.

Order to Show Cause) has, in many cases, taken three to four months for applications and four to six months for rule making petitions. After the 30 day period, in which licensees typically state they will file an application, the application is not filed until the end of the 180 day period, and then, due to FAA requirements, often remains pending for up to one year or more before action is taken. In the rule making context, similar delays are experienced. The Parties suggest that the FCC announce a 6 month application period for all Class C stations currently operating with facilities that are below the minimum height above average terrain for Class C status. If no application is filed then the reclassification should take place. If an application is filed then the normal process ensues either the application is granted with a 3 year construction period, or the application is denied and the reclassification takes place. The benefit of resorting to this method is to eliminate numerous petitions and applications that are being filed for the purpose of triggering Class C stations. It is unnecessary to handle these requests on a case by case basis any longer. All Class C stations have had over 4 years to determine whether they will be able to achieve Class C status. The FCC does not have the resources to process applications and petitions filed for the sole purpose of asking the Class C station whether it intends to increase its height. Comments on this matter can be solicited based on the experience of participants to this process.

III. ADDITIONAL CHANGES TO THE COMMISSION'S RULES AND POLICIES PROPOSED BY THE PARTIES.

19. The Parties believe that several additional changes to the Commission's rules and policies would be beneficial. Like the proposals discussed above, these changes are intended to allow the Commission to act more efficiently on FM rule makings and applications, thus allowing it to carry out its Section 307(b) mandate.

A. Payment of the Rule Making Filing Fee when the Petition or Counterproposal is Filed Rather than when Granted.

20. The assessment and collection of filing fees is a statutory mandate. Section 8 of the Communications Act requires the Commission to assess and collect application fees, and contains a schedule of fees for applications in various services.[13] The statutory schedule contains specific fees for a petition to amend the FM Table of Allotments to specify a higher class channel or a new community of license.[14] The Commission's current practice is at variance with these congressional directives. Currently, the Commission assesses a filing fee for a petition to amend the TV or FM Table of Allotments *only if the petition ultimately succeeds.*[15] Moreover, the Commission assesses the fee only in the cases of petitions to change an existing allotment, not to add a new allotment.[16]

21. Congress designed the application fee structure to recover the costs of processing applications from the public.[17] The fee structure is based on the cost of regulation.[18] That is, the filing fee accompanying a given application is designed to match as closely as possible the cost of processing that application.[19] As a matter of economics, this cost-matching approach has two

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13 47 U.S.C. § 158. As discussed below, use of the term "application" in the statute includes petitions and other filings as well as application forms, but excludes regulatory fees.

14 47 U.S.C. § 158(g).

15 *See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989, Memorandum Opinion and Order*, 5 FCC Rcd 3558, 3659-60 (1990) ("*Fees II*"), *recon*., 6 FCC Rcd 5919 (1991) ("*Fees II Recon*"). *See also* Mass Media Services Application Fee Filing Guide at pp. 14 n.5, 15 n. 11 (Sept. 1, 2000) ("Application Filing Fee Guide"). Payment of the fee is due when an application on Form 301 or 302 is filed, and is in addition to the fee required for the application.

16 Application Fee Filing Guide, *supra*.

17 H. Rep. No. 101-247, 101st Cong. 1st Ses. at 588, *reprinted in* 1989 U.S.C.C.A.N. 1906, 2310 ("*1989 House Report*"); H. Conf. Rep. No. 101-386, 101st Cong., 1st Sess. At 433, *reprinted in* 1989 U.S.C.C.A.N. 3018, 3036 ("*1989 Conference Report*").

18 *1989 House Report* at 546, 1989 U.S.C.C.A.N. at 2267.

19 *Fees II*, 5 FCC Rcd at 3574 ("We have worked with Congress to ensure that, to the best extent possible, fees reflect only the direct cost of processing the typical application or filing.").

beneficial effects. First, it provides a source of funding for the agency's day-to-day activities. Second, and more importantly, it gives applicants the incentive to use the "right amount" of Commission resources. In ordinary market economics, whenever a good or service is priced too low, consumers are encouraged to purchase too much of it, and resources are diverted away from other more productive uses in order to satisfy the artificially increased demand. Conversely, if the price is too high, not enough is purchased, and the potential benefits of the good or service are underrealized. In either case, the result is a misallocation of resources among the various goods and services produced as well as an inefficiency or failure in the market. In just the same way, when application fees are set too low, or not imposed at all such as is the case with rule makings, applicants are encouraged to file too many applications, and the Commission must divert staff from other tasks in order to process the flood of applications. On the other hand, if application fees were too high, applicants would be discouraged from filing and the public would be deprived of potentially valuable services that could have been provided.

22. The Commission's current practices with regard to rule making filing fees violate this basic cost-matching principle and the underlying rationale of Congress for an assessment of such fees. By assessing an application fee only after the rule making proposal is granted, the Commission is in effect permitting the filing a petition for rule making to add a new allotment for free. Moreover, filing a proposal to modify an existing allotment is virtually free – no fee at all is assessed upon its ***filing***, only upon its success. As a result, speculative filings are encouraged, since speculative filings are less likely to succeed, and thus are less likely to incur a fee. Two predictable effects have resulted. In FM rule making proceedings, where many proceedings are contested and do not result in an automatic allotment to the petitioner, the Commission is flooded with rule making petitions for which no fee is ever paid and no cost is

ever recovered. Second, the Commission's processing staff, is chronically understaffed and backlogged, and the processing of the more *bona fide* allotment proceedings is unavoidably delayed.

23. The solution to these problems is simple. The Commission should assess the statutorily mandated filing fee for a proposal to amend the FM Table of Allotments upon the filing of the proposal rather than when the implementing application is filed. Specifically, the Commission should require that a filing fee accompany any initial petition or counterproposal to amend the FM Table of Allotments to add a new allotment, change a community of license, or request a higher class channel.[20] The amount of the filing fee should be the amount currently required to be filed at the time of filing an application by the successful rule making proponent. That fee is currently $2,210.00 for changes by existing stations and $2,865.00 for new stations.[21] The successful rule making proponent would continue to pay the Form 301 filing fee set forth in the rules for a new or major change construction permit at the time of filing that application.

24. Requiring a filing fee to accompany a petition for rule making is good policy for three reasons. First, as Congress envisioned, such a requirement will assess those who use the Commission's processes with the costs of regulation that they cause. As discussed above, this will lead to the efficient deployment of Commission resources and help the agency recover the costs of regulation from the regulated industry. Processing petitions to amend the Table of Allotments can consume a vast amount of Commission resources, and when the Commission diverts staff from other productive purposes to allotment proceedings the Commission does not

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[20] The filing fee should NOT be imposed upon a party merely filing comments, without any expression of interest in an allotment, in an allocation rule making proceeding. The proposal is to impose the fee only upon a party who submits a commitment to file an application based upon the requested rule making change.

[21] 47 C.F.R. § 1.1104(1)(k), 3(l).

function efficiently. Congress expects those who utilize Commission resources to pay for those resources. Second, filing fees will help to discourage speculative and frivolous petitions to amend the FM Tables of Allotments. The Commission's resources are not put to good use when they are devoted to the processing of rule making proposals that are filed not for the purpose of improving service to the public, but purely for speculative or strategic reasons (often termed "strike" filings). The Commission's existing processes do not sufficiently deter strike petitions, and such petitions can be prepared and filed at little cost. Third, filing fees will further the rapid introduction of new and improved broadcast service to the public, since Commission resources will be freed up to process *bona fide* petitions designed to improve service and initiate service to underserved areas. In addition, with many speculative petitions removed, allotment proceedings will become simpler and their processing more rapid and straightforward.

25. Assessing a filing fee on rule making petitions is permissible under the application fee statute. First, nothing in the statute prohibits the assessment of fees on rule making petitions as opposed to applications. The statute requires that the Commission assess and collect "application fees." However, Congress' use of the term "application fees" does not limit the fees to filings by application only. The statute originally referred to "charges," rather than "application fees," and the relevant provisions – those requiring the Commission to assess and collect charges for certain petitions to amend the FM Tables of Allotments – were added as "charges" to be assessed and collected by the Commission.[22] The term "charges" clearly can encompass rule making filing fees as well as application filing fees. The term was changed to "application fees" when Section 9 of the Communications Act was added to provide for the assessment and collection of regulatory fees. It appears that Congress used the term in a general

[22] *See* Pub. L. No. 101-239, 101st Cong., 1st Sess., 103 Stat. 2126 (1989).

sense to distinguish the one-time fees of Section 8 from the recurring fees of Section 9.[23] Indeed, the Commission itself refers to the fees collected under Section 8 of the Act as "application *and other* filing fees."[24] Moreover, the schedule of fees includes fees for a number of other services that are not strictly associated with applications, such as requests for special temporary authority, hearing designation fees, tariff filings, and special relief petitions.[25]

26. Second, nothing in the statute limits the assessment of fees to initial petitions as opposed to counterproposals. The Commission may also assess fees upon counterproposals within the ambit of the statutory scheme. Under the Commission's current interpretation of the statute, the rule making fee is paid by the successful rule making proponent, whether the successful proposal arose from an initial petition or a counterproposal. This is a reasonable interpretation, and would be carried forward under the rule requested herein.

27. Third, nothing in the statute prohibits the assessment of fees on petitions to add a new allotment as opposed to those seeking changes to existing allotments.[26] The statute requires the assessment of fees on a "Petition for Rulemaking for New Community of License." A petition requesting a new allotment literally requests a new community of license, since the requested channel is not associated with *any* community of license before its allotment. The Commission's narrow interpretation to petitions filed by existing licensees first appeared without comment in an appendix to its order implementing the amendments in which the rule making

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23 See Pub. L. No. 103-66, 103rd Cong., 1st Sess., 107 Stat. 400-01 (1993).

24 *See, e.g.*, 47 C.F.R. § 1.1104 ("Schedule of charges for applications and other filings for the Mass Media Services"); *Amendment of the Schedule of Application Fees Set Forth in Sections 1.1102 through 1.1107 of the Commission's Rules,* 15 FCC Rcd 17615 (2000).

25 *See* 47 U.S.C. § 158(g).

26 Note that if the proposal to permit a change in community of license by minor change, Section II.A, *supra,* is granted then there will be fewer rule making proceedings initiated to change community of license.

fees were added to the fee statute.[27] The legislative history does not offer any indication that petitions for new allotments were intentionally excluded.[28] The most reasonable interpretation of the limiting language is that Congress wanted to avoid imposing a general fee on all rule making proceedings.[29] The processing of a petition for a new allotment is not different in any material respect from the processing of a petition to change an existing allotment, since the petitioners must make the same showings regarding the eligibility of the new community. Given that the statute is designed to recover the costs of application processing, the two processes are virtually indistinguishable.

28. Finally, nothing in the statute prohibits the assessment and collection of a rule making fee at the time of filing the proposal or counterproposal. The statute simply requires the assessment and collection of a fee for certain petitions to amend the tables of allotments. It does not state or indeed imply that the fee should be contingent upon success, nor does the legislative history support that interpretation. Other filing fees are not contingent upon success, since the Commission retains application filing fees even if the accompanying application is dismissed or denied.[30] Thus, collection of the fee at the time of filing best furthers the intent of Congress to recover the costs of processing the filings.

29. Nevertheless, should the Commission determine that it needs additional legislative authority to impose a rule making fee, the Commission could, while waiting for Congress to act, require that a Form 301 application be filed along with the petition or counterproposal and the fee could be imposed on the Form 301 filing. The Commission already

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27 *See Fees II*, 5 FCC Rcd at 3659 (¶¶ 64, 70), *supra*.

28 *1989 House Report* at 545-46, 588-89, *reprinted in* 1989 U.S.C.C.A.N. 2266-67, 2310-11; *1989 Conference Report* at 433, *reprinted in* 1989 U.S.C.C.A.N. 3036.

29 *See Fees II Recon*, 6 FCC Rcd at 5925 (holding that rule making fees are not an "unconstitutional tax on the ability of the public to participate in the process of government").

30 47 C.F.R. § 1.1108.

has a process for filing only the Technical Box portion of the Form 301 application with a full Form 301 application provided at a later date as in the context of the AM window filing. The Form 301 submitted with the rule making proposal could contain the engineering information which coincides with the rule making proposal. This form would remain pending during the rule making process and appropriately modified at the implementation stage should the rule making proposal be granted. This process could work for requests for both new allotments and major change petitions (more than four contingent proposals). The Form 301 filing would specify a particular transmitter site which could be the site desired by the applicant or it could be a site which complies with allocation standards which would be later amended when reasonable assurance is obtained (no later than the filing period to implement the rule making, i.e., within 90 days of the effective date or within the window period for new allotments). In conclusion, the FCC should view this request as merely having the filing fee that it already imposes at the end of the rule making process to be paid at the beginning of the process. No additional Congressional authority should be needed to change the time that the fee is paid.

B. Permit Applicants to Propose Changes in Vacant Allotment Reference Points.

30. The Commission protects vacant allotments at the reference point created during the rule making process until a filing window is open and an application for the allotment granted.[31] Occasionally, a vacant allotment precludes another beneficial spectrum change, but the spectrum change could be accomplished if the vacant allotment specified a different reference point. However, it is not now possible to change only the allotment reference point. To change the allotment reference point, it is necessary to file a rule making proposal which

[31] *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, 13 FCC Rcd 15920, 15991 (1998), *clarified*, 14 FCC Rcd 8724 (1999), *aff'd*, 213 F.3d 761 (D.C. Cir. 2000).

must include other changes to the FM Table of Allotments. The length of time between an allotment and a window filing period has been lengthy, with over 800 vacant channels remaining at this time. Many stations are unable to improve their facilities by what would otherwise be a minor change application filing and some not at all unless the station is able to file pursuant to one of the Commission's short spacing rules (Section 73.213 or 73.215) to protect a vacant allotment reference point. In those instances, many improvements in facilities can not be realized.

31. To avoid the delays or avoid risking no improvement at all, the applicant should be able to routinely propose a reference point change for a vacant allotment without a rule making proceeding. The new reference point must simply comply with 73.207 spacing rules and 73.315 principal community coverage rules. Since no change to the FM or TV Table is involved in a change of coordinates for a vacant channel, there is no need for a rule making proceeding. This procedure could eliminate some of the rule making petitions that are filed.

C. Permit the Use of Alternative Contour Prediction Methods at the Allocation Stage for City Grade Coverage.

32. The Commission should permit the routine use of the Longley-Rice terrain-sensitive prediction method to demonstrate coverage of a station's community of license. Currently, compliance with the community coverage requirement in Section 73.315 must be performed as prescribed in Section 73.313, which sets forth the Commission's "standard prediction method." However, Section 313(e) permits a supplemental showing in lieu of the Commission's standard prediction method where the terrain departs widely from the average elevation.[32] In 1997, the Commission adopted standards for the use of a supplemental showing

[32] *See* 47 C.F.R. § 73.313(e).

in this context.[33] Those standards include a demonstration that the contour distances predicted by the standard method and the supplemental method differ by at least 10%, and a showing of how the terrain departs widely from the average terrain assumed by the standard prediction method.

33. Recently, however, the Commission has attempted to restrict the use of a supplemental prediction method to situations in which the departure from average terrain, as measured by the "delta-h" factor, varies not just widely but *extremely* widely.[34] Specifically, the Commission has required that applications using a supplemental showing demonstrate that the delta-h is either less than or equal to 20, or greater than or equal to 100 (for average terrain, the delta-h is 50). As will be shown, this "delta-h test" is unsound policy, and should be abandoned.

34. The Commission should remove all restrictions on the use of the Longley-Rice prediction method as a supplemental method in establishing compliance with the community coverage rule. The Longley-Rice method (sometimes referred to as "Tech Note 101") has been in standard use in the engineering community for more than 30 years. The Commission recognizes the superiority of the Longley-Rice prediction method in nearly every context except FM contour prediction.[35]

35. Neither the 10 percent standard nor the delta-h standard is of any practical utility as an engineering matter. The standard prediction method is based on average terrain, not actual terrain. As such, it can be expected to produce accurate results only over average terrain. In

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33 *Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, 12 FCC Rcd 12371 (1997).

34 *See, e.g.*, Letter from Associate Chief, Audio Division to Mark N. Lipp, Counsel to Cumulus Licensing Corp., in re KMAJ-FM (Aug. 8, 2002).

35 *See, e.g., Norwell Television LLC, for Modification of the Boston, Massachusetts DMA*, 17 FCC Rcd 35 (2001) (television Grade B contour prediction); *Advanced Television Systems*, 13 FCC Rcd 7418 (1998) (DTV); *Advanced Television Systems*, 12 FCC Rcd 14588 (1997) (LPTV and TV Translators); *Amendment of the Commission's Rules to Establish a New Personal Communications Service*, 9 FCC Rcd 4957 (1994) (PCS).

fact, *wherever* the actual terrain departs from the average (not just where it departs widely), a reliable terrain-sensitive prediction method can be expected to produce more accurate results than a method that assumes an "average terrain" that does not exist. Thus, if Longley-Rice predicts that the 70 dBu contour extends over a community of license even though it extends only five percent beyond the standard prediction contour, the Commission has no technical ground to disagree with the predicted coverage. The terrain variance in that hypothetical case, while not "wide," was evidently sufficient to push the contour out over the community, and that is all the Commission needs to be concerned with.

36. Moreover, the 10 percent standard and the delta-h standard, by restricting the ability of applicants to locate a suitable tower site, adds to the Commission's workload. By applying these threshold requirements to the use of a supplemental showing under 73.313(e), the Commission excludes many applications which provide new or improved service to the public that would otherwise be acceptable. Often, the applicant who is unable to meet this threshold requirement is forced to file a petition for rule making to change its community of license in order to use a particular site. Thus, as a matter of policy, the effect of these threshold standards is to create a larger number of new requests for changes in community of license that otherwise would not need to be filed. Clearly, processing these unnecessary requests takes a heavy toll on the agency's resources.

D. The Allocations Workload Should be Made Available to the Public.

37. The processing of a petition for rule making can be a long process, depending on its complexity. Although most petitions are processed in the order in which they are filed, it is not predictable how long the processing of any given petition will take. Because the processing time is variable, it is often necessary for rule making proponents or their representatives to make multiple telephone calls or e-mail inquiries to the FCC staff to determine the status of their

proposals. Responding to these inquiries can take valuable time away from those responsible for processing the rule making proceedings.

38. The Commission should publish and maintain on its web site a status list of the FM and TV rule makings pending before it. Such lists have been published for various categories of applications for many years. As a result, interested parties can monitor the progress of the processing of their applications and predict with some reliability when the Commission will take action. This allows applicants to plan their activities and time their funding commitments, resulting in efficiencies and savings to the public. In addition, the application processing staff are contacted much less often and are able to spend more time processing applications and less time responding to inquiries. The same conservation of resources could be realized if the FM and TV rule making petition backlog were published on the Commission's web site. As in the case of applications, FCC processing staff could make notations or comments where appropriate to indicate the cause of any processing delays. This simple procedure could produce savings in processing resources and benefits to the public.

IV. CONCLUSION

The Parties submit that all of the proposals discussed in these Comments to the Commission's rules and policies will more efficiently help the Commission efficiently carry out the mandate of Section 307(b) of the Communications Act. By adopting these proposals, the public interest will be served through the expeditious delivery of new and improved radio service and more efficient use of the spectrum. Due to budget constraints and other priorities, it is clear to the broadcast community and the Parties to these Comments that the FCC is unable to devote more resources to deal with the FM workload. Therefore the solution should be to consider ways to streamline the process through the changes to the Commission's rules and policies discussed in these Comments. The Parties encourage the Commission to promptly issue a Notice of

Proposed Rule Making in this proceeding to so that other members of the broadcast community may comment on these proposals and the FM rule making and applications process can be streamlined as soon as possible.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lisa Balzer, a secretary in the law firm of Vinson & Elkins, LLP, do hereby certify that I have on this 24th day of May, 2004, caused to be mailed by first class mail, postage prepaid, copies of the foregoing "**Comments**" to the following:

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